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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

—v.—

ALLAN BAKKE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF AMICUS CURIAE THE NATIONAL CONFERENCE OF BLACK LAWYERS

RALPH R. SMITH
3400 Chestnut St.
Philadelphia, Pa. 19174
(214) 243-6072

ANSLYENE A. ABRAHAM
3045 W. 7th St.
Los Angeles, Calif. 90005
(213) 380-4790

VANCE FORT
634 North Carolina Ave., S.E.
Washington, D.C. 20003
(202) 544-5410

Of Counsel:
LENNOX S. HINDS,
National Director

VICTOR M. GOODE,
Associate Director

National Conference of Black Lawyers
126 West 119th Street
New York, New York 10027

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Interest of Amicus Curiae

The National Conference of Black Lawyers is an incorporated association of Black lawyers and law students in the United States and Canada established in December of 1968 for the purpose of serving as an effective advocate of the rights of minorities and the poor. In furtherance of its stated purpose this organization has conducted a systematic program of federal and state litigation designed to provide adequate protection of the rights of the politically unpopular criminal defendant; initiated civil actions to compel equal distribution of community services; monitored the work of state and federal legislatures, administrative agencies, courts and the executive branch to insure that the interests of the poor and racial minorities are properly represented.

Upon learning of the unfortunate ruling by the California Supreme Court the National Conference of Black Lawyers set out to assess the circumstances surrounding the case. To do so, we solicited the views of constitutional scholars across the country, from members of the bar and bench and from professionals in the fields of medicine, business and social work.

This extensive and intensive inquiry quickly revealed the very serious infirmities of the instant case. Under the circumstances it appeared that the attempt to obtain United States Supreme Court review of the case would place the National Conference of Black Lawyers on the horns of a dilemma.

On the one hand, to insist (as we must) on calling the Court's attention to the critical defects in this case which touch upon its justiciability would be to risk having the Court refuse to exercise jurisdiction and leave standing the decision of the California Supreme Court. Such a

result would be only slightly less undesirable than an affirmance.

On the other hand, to join the parties and the various *amici* in urging this Court to decide the "merits" and uphold the constitutionality of the program in question, would be to ignore the very real problems with this case and would be to say that the most significant civil rights ruling of this decade should henceforth be associated with a case as defective and as tainted as this is.

Since neither course of action appeared desirable, the National Conference of Black Lawyers sought to have the California Supreme Court review its decision. When this effort failed the National Conference of Black Lawyers urged this Court to vacate and remand summarily the judgment of the lower court.

At this stage of the litigation the interests of the National Conference of Black Lawyers remain as they were earlier. We are hopeful that this Court will clearly and unequivocally state that limited preferences designed to assure the admission of qualified minority students to educational institutions are constitutionally permissible and appropriate and that such actions are necessary if the promise of the Civil War Amendments is to be fulfilled and the goal of a truly open society to be achieved.

However, we also have an interest in assuring that so profound a pronouncement not be obscured, diluted or tainted by the infirmities of a poorly developed record and a nonadversary case.

For these reasons, in the argument below the National Conference of Black Lawyers will first ask the court not to reach the ultimate constitutional issue purportedly presented. We will also argue that should the Court choose to reach this issue, the California Supreme Court ought be reversed.

Summary of the Argument

Whether race can be used as a factor in the admissions process at a state graduate school is an important issue which would best be decided on a fully developed record in a vigorously litigated case. Since this is not such a case, the Court should resort to its time-honored practice of not deciding constitutional issues until necessary and dispose of this case on the other grounds available.

If, however, the Court chooses to reach the ultimate constitutional issue presented, the Court should reverse the California Supreme Court. The limited preference afforded to applicants from selected racial, cultural and political minorities by the admissions program which is being challenged in this case is not violative of the Fourteenth Amendment merely because of its disproportionate impact on applicants who are not members of those groups. To the contrary, the program challenged in this case is a necessary and appropriate initial effort toward remedying the existing exclusion of these minorities from higher education.

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BRIEF OF AMICUS CURIAE THE NATIONAL CONFERENCE OF BLACK LAWYERS

This brief is being filed by the National Conference of Black Lawyers with the consent of the litigants in accordance with Rule 42 of this Court.

ARGUMENT

I.

Because The Circumstances Surrounding The Origin, Development And Conduct Of This Case Show That It Has Not Been Presented In The True Adversarial Manner Best Suited For Judicial Resolution Of This Very Important Issue And As A Consequence Is Of Dubious Justiciability, This Court Should Refuse To Decide The Ultimate Constitutional Issue Being Raised By The Parties.

Article III of the United States Constitution has been interpreted to limit the power of this court to those cases in which there is a definite controversy concerning the

legal relations of parties having adverse legal interests. *Aetna Life Insurance Co.* v. *Haywortb*, 300 U.S. 227 (1937). This adverseness must be concrete so that the issue is sharply presented and illuminates the constitutional question before the court. *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). This is particularly so when the court is being asked to declare a legislative act unconstitutional.

> . . . such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of a real earnest and vital controversy between individuals. It never was thought that by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of a legislative act. *Chicago* v. *Wellman*, 143 U.S. 339, 345 (1882).

This requirement of adversariness of necessity precludes the Court from entertaining a suit where there has been collusion between the parties. However, nonadverseness is not coextensive with collusion. Even in the absence of collusion, where there is reason to believe that the suit was initiated by agreement between the parties *Waialua Agricultural Co.* v. *Maneja*, 178 F.2d 603 (9th Cir. 1949), or that the proceeding was started and continued in a friendly manner, *Chicago*, or that the plaintiff and defendant, initially adverse parties, have become the same since the rendering of the judgment below, *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892), courts have declined to exercise the power of review.

Amicus curiae contends that the circumstances of this case raise grave problems of justiciability in this regard

despite the fact that there is no evidence that there was collusion between the University and Bakke.

> We do not mean to insinuate aught against the management of the company. The silence of the record gives us no information, and we have no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grevious wrong to the public, . . . *Chicago* at 346.

The public in the instant case includes those minorities who have been the primary beneficiaries of programs like the one challenged in this case. As these groups are generally not parties to suits of this type, and because the defendant institution may be a fortuitous but reluctant champion of the programs, this Court should carefully scrutinize litigation in the "reverse discrimination" genre to assure that there is indeed a true adversary relationship between the parties.

1. The facts show that an official of the University facilitated, encouraged, and supported the bringing of this suit against the University of California Davis Medical School.

The exchange of correspondence between Allan Bakke and the Assistant to the Dean for Student Affairs and Admissions supports this contention.[1] Two weeks after Bakke indicated that he was inquiring . . ." about the

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[1] These letters were included in the Appendix of the Brief of Amici Curiae on Petition for a Writ of Certiorari, pp. 1a-12a. They are also a part of the record. Clerk's Transcript on Appeal at 263-271, *Bakke* v. *Regents of the University of California*, 18 Cal. 3d 34, 533 P.2d 1152 (1976).

possibility of formally challenging the concept of special admissions, the University official thanked him for his "thoughtful" letter, suggested that he "pursue [his] research into admission policies based on quota-oriented recruiting, voluntarily disclosed information on the special admissions program, urged him to "review carefully" the then pending suit against the University of Washington,[2] and gratuitously supplied the names of persons who could be of assistance in challenging the special admissions programs.

In a subsequent letter, the same University of California official endorsed Bakke's plan to sue the Davis Medical School even though Bakke had outlined another option and had graciously afforded the University official veto power over his course of action.[3]

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[2] *Defunis* v. *Odegaard*, 82 Wn. 2d 11, 507 P.2d 1169, *vacated as moot*, 416 U.S. 312 (1974), *on remand*, 84 Wn. 2d 617, 529 P.2d 438.

[3] Bakke's letter outlined two possible courses of action. Plan A was to sue Stanford and UCSF if admitted to Davis. Plan B was to sue Davis and UCSF if admitted to Stanford or to sue UCSF alone if admitted to Davis. The following is an excerpt from this letter:

> "Two principles I wish to satisfy in choosing my course are these; 1. Do nothing to jeopardize my chances for admission to Davis under the E.D.P. 2. Avoid actions which you, Mr. Storandt, personally or professionally oppose. My reason for this is that you have been so responsive, concerned, and helpful to me.
>
> "Plan B has one potential advantage over plan A. It contains the possibility, probably remote, of my entering medical school this fall, saving a full year over any other admissions possibilities. Because my veterans' educational benefits eligibility expires in September, 1976, admission this year would also be a great financial help.
>
> "Mr. Storandt, do you have any comments on these possible actions? Are there any different procedures you would suggest? Would Davis prefer not to be involved in any legal

[Footnote continued on following page]

Any questions or ambiguity about the intention and attitude of this particular university official were resolved by him in a recent statement. He candidly admitted that he had encouraged Bakke to begin the lawsuit and had acted out of concern that the program in question and others like it were not fair or constitutional.[4]

> action I might undertake, or *would such involvement be welcomed as a means of clarifying the legal questions involve*. Clerk's Transcript on Appeal at 268-69. [Emphasis added.]

The response went as follows:

> "Dear Allan: Thank you for your good letter. It seems to me that you have carefully arranged your thinking about this matter and that the eventual result of your next actions will be of significance to many present and future medical school applicants.
>
> "I am unclear about the basis for a suit under your Plan A without the thrust of a current application for admission at Stanford, I wonder on what basis you could develop a case as plaintiff; if successful, what would the practical result of your suit amount to? With this reservation in mind, in addition to my sympathy with the financial exigencies you cite, *I prefer your Plan B, with the proviso that you press the suit—even if admitted—at the institution of your choice.*" [Emphasis added.] *Id.* at 266.

[4] Los Angeles Times, February 4, 1977, at 1 *UC Official Backed Reversed Bias' Suit*. Excerpts from that article are as follows:

> An admissions officer at the UC Davis medical school encouraged the filing of what has become a controversial "reverse discrimination" lawsuit challenging special admissions programs for minority students.
>
> The officer, Peter C. Storandt, now an associate dean for admissions at Oberlin College in Ohio, told The Times that he acted out of concern that the Davis program, and others like it, were not fair or constitutional. . . .
>
> "If I had it to do all over again," said Storandat, "there wouldn't be any letters from me. I might have talked to him on the phone (but would) have insisted that our conversations be off the record."

Were these the sole facts, there would be considerable basis for questioning the adversity of this suit. However, these facts are part of a larger mosaic of similar conduct.

2. Despite its early contention that Bakke would not have been admitted even were there no special admissions program, the University voluntarily sought a declaratory judgment in this case and thus exposed the special admissions program to undue risk.

Bakke had challenged the program on constitutional grounds and it was clear that he would be unable to prove that he was injured in any way by its operation. Had he failed to meet this burden (as he subsequently did) the trial court would not have had to reach the merits of Bakke's claim. To forestall this possibility of early disposition of the case, the University filed a cross-complaint seeking declaratory judgment as to the constitutionality of the challenged program.[5] The University thus assumed the burden of proving the constitutionality of its program, irrespective of the disposition of Bakke's complaint. The University then proceeded to develop a clearly inadequate record. Moreover, through an oversight, counsel for the University neglected to argue the

[5] The University admitted that its cross complaint was filed "In order to bring the issue of the legality of the special admissions programs squarely before the court regardless of whether the operation of the program resulted in Bakke's failure to be admited . . ." Opening Brief of Appellant and Cross-Respondent in the Supreme Court of the State of California at 2.

issue or "to remind the court of the cross-complaint for declaratory relief." [6]

3. The University of California deliberately failed to challenge the crucial finding of the trial court that nonminority applicants were barred from participation in the Special Admissions Program.

The critical determination in *Bakke* v. *Board of Regents* was the trial court's finding that the special admissions program discriminated against nonminority students.

> The special admissions program purports to be open to "educationally or economically disadvantaged" students. In practice the special admissions program is open only to members of minority races and members of the white race are barred from participation therein . . . This special admissions program discriminates in favor of members of minority races, and against members of the white race, plaintiff, and other applicants under the general admissions program. (Clerk's Transcript on Appeal at 387-388) [7]

This finding is clearly erroneous and totally unsupported by the evidence placed in the record by the parties. The uncontroverted testimony of the sole witness for either side shows (1) that the special admissions program was designed to be and was described as being a program

[6] Letter of September 30, 1974 from Donald C. Reidhaar to Judge Manker. Clerk's Transcript on Appeal at 283.

[7] This finding was first proposed by plaintiff in his Proposed Findings of Fact and Conclusions of Law, Clerk's Transcript on Appeal at 322-324.

for the economically and educationally disadvantaged;[8] (2) that nonminority students could and did apply via the special admissions program;[9] (3) that the applications of nonminority students who applied to the special admissions program were duly considered by the Task Force.[10] While the testimony shows that no nonminority

[8] The document describing the Special Admissions Program was entitled "Program to Increase Opportunities in Medical Education for Diadvantaged Citizens." The first paragraph stated: "A special subcommittee, comprised of faculty and medical students evaluates applicants from economically and/or educationally disadvantaged backgrounds who request on the application form such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged background. . ." Clerk's Transcript on Appeal at 195-196.

[9] For the class entering in 1973, 297 students applied under the Task Force. This included Black, Chicano, American Indian, Asian and white economically disadvantaged students. Clerk's Transcript on Appeal at 174. This figure was obtained from statistics compiled by the Admissions Office at Davis Medical School. These stistics were a part of the Record. *Id.* at 201-223, and further showed that from 1970 to 1973, white economically disadvantaged students applied as 'minority applicants'. This was later corroborated by Dean Lowrey's declaration that non-minorities (racial) did apply under the Special Admissions program. *Id.* at 65.

[10] Minority group status was one factor in determining relative disadvantage. Declaration of Associate Dean Lowrey, Clerk's Transcript on Appeal at 65-66. A disadvantaged minority applicant therefore had a slight advantage over a disadvantaged white applicant in the determination of whether he/she would be admitted through the Task Force Program. This did not mean that applications of non-minority students were not given due consideration.

Dr. Sarah D. Gray, member of the Admissions Committee and a past Task Force Chairman, in a letter to the Editor of *The Sacramento Bee*, made clear that white students were not arbitrarily excluded from the program as had been implied in an article in that newspaper. She stated that a number of white students had been interviewed for special admission. Letter reprinted in the Appendix Brief of Amici Curiae on Petition for Writ of Certiorari at 9a-12a.

students were ultimately accepted by the special admissions task force, that fact alone cannot compel or support a finding of unconstitutional discrimination. The disproportionate impact on nonminority applicants may well have been attributable to a combination of other factors. Since many of the Task Force admittees had higher objective and higher benchmark scores than some students admitted through the regular admissions process, (Clerk's Transcript on Appeal at 178, 223) it would not be surprising if they also had higher scores than the nonminority applicants to the Task Force Program. To the extent that these objective indicators played a role in the Task Force admissions decision, the minority admittees would be favored. Moreover, as Dr. Sarah Gray, a faculty member of the Task Force suggests, the "disadvantage" profile of these admittees may also have comported most closely with the criteria the Task Program was designed to apply.

> Although grades, test scores and disadvantage factors are used in the initial screening of these applicants, the students who are finally selected for admission are chosen because they present the strongest evidence of a serious desire to eventually return to a disadvantaged area similar to that from which they came (mainly inner city ghetto, rural area, or Indian reservation) to provide health care, since those are the geographical areas in which medical needs are not being served adequately by the medical profession. With those criteria, it is not surprising that most of the students who have entered are the ones who come from racial minorities, since those are the ones who predominately inhabit California's disadvantaged areas, and they are the ones who have a paramount interest in the living conditions there . . ." [11]

[11] See note 10, *supra*.

Dr. Gray's position seems eminently reasonable and is borne out by the record which shows that relative disadvantage was an important factor even among the minority students considered by the Task Force. Many minority applicants were sent through the regular process because they were not sufficiently disadvantaged to merit special consideration.[12]

An important aspect in this case is that the trial court below, misstated and misinterpreted a statement made by Dean Lowrey in his deposition. The relevant colloquy was as follows.

> Q. Did all of those who indicated a minority ethnic identification under Question 13 or who answered 15 in the affirmative become applications which were referred to the Task Force?
>
> A. No.
>
> Q. How did that work then, how were people referred to the Task Force?
>
> A. Again, our emphasis, rather than on ethnic, was on disadvantaged.
>
> Q. Yes?

[12] Statistics compiled by the Admissions Office showed that over 40% of the minority students who were enrolled within 4 years of the institution of the Task Force program were admitted through the regular admissions process. Clerk's Transcript on Appeal at 203-204.

In his declaration and deposition, Dean Lowery showed that in making the determination of whether or not an applicant was disadvantaged, the Chairman of the Special Admissions Committee looked at factors as whether the student requested and was granted a waiver of his application fee, whether the student was an Educational Opportunity Program student in college, whether the applicant worked during his undergraduate years and the parents' occupation and education level. *Id.* at 65, 192.

> A. May I give you an example?
>
> Q. Yes.
>
> A. If we had a black student whose father was a physician and who had gone through four years of pre-med school with little difficulty and by this I mean consecutive years, he would not be considered a minority student as designated on the question here. He would not be considered a Task Force applicant.
>
> Q. He would have two qualifications, a minority student and educationally or economically disadvantaged?
>
> A. That is right. (Clerk's Transcript on Appeal at 170)

The Superior Court, however, misread and misinterpreted this last question and answer as follows

> Q. He would have *to meet* two qualifications, a minority student, and educationally or economically disadvantaged?
>
> A. That is right. (Clerk's Transcript on Appeal at 295) (Emphasis added)

This revised reading is by no means harmless. It transformed a "disadvantaged" program into a program for disadvantaged minorities. This strongly appears to have been the basis for the court's erroneous finding that whites were excluded from participation in the program.

> It appears to this Court that it logically follows that such a program discriminates in favor of minority racial groups and against the white race. *Ibid.*

Although this mistake was present in the Notice of Intended Decision filed on November 24, 1974 (Clerk's

Transcript on Appeal at 286) and although the University had ample time and did respond to this Notice of Intended Decision (Clerk's Transcript on Appeal at 310) the University has to date failed to apprise the Court of this clearly significant error. A truly adversial attitude would have demanded that the California Supreme Court be asked to review that particular finding and hold that it was contrary to the evidence and thus clearly erroneous.

4. The University of California failed to seek a rehearing of three significant aspects of the California Supreme Court's decision which would adversely affect any good faith effort to defend these programs.

First: When the case was argued before the California Supreme Court, on March 18, 1976, the U.S. Supreme Court had not yet rendered its decision in *Washington* v. *Davis*, 426 U.S. 229 (1976). *Washington* v. *Davis* significantly altered prevailing conceptions of plaintiff's burden of proof under the Equal Protection clause of the 14th Amendment as distinct from such burden under Title VII. While this case was discussed in both the majority and dissenting opinions, it is clear that the Court could have benefited from a sharp incisive discussion of the importance and applicability of *Washington* v. *Davis* to the facts of the instant case. As discussed below, the very framing of the issue in *Bakke* is at odds with *Washington* v. *Davis*, which requires more than proof of disproportionate impact.[13]

Second: The University of California states that "Bakke's admission *rel non* (sic) comes down to where

[13] *See* discussion *infra*, Part III.

the burden of proof on that question is allocated."[14] Despite this, the University failed to request the California Supreme Court to reconsider its decision to shift that burden to the University. Ironically, it was *amici curiae* who propounded the argument on the University's behalf. *Amici* argued that the reallocating of the burden of proof was unwarranted and would unnecessarily burden the exercise of sound academic discretion.[15]

In reallocating the burden, the California Supreme Court analogized this case to a series of Title VII cases.[16] As discussed below, the analogy is inappropriate and inapposite.[17] This is a matter that a real adversarial relationship would have brought to the Court's attention and urged its reconsideration.

Third: Although the California Supreme Court recognized the "manifest prejudice" *Bakke* v. *Regents*, at 63, *ibid.*, which would result from retroactive application of its decision, it went on to allow its holding to extend to "Bakke and any other applicants who have filed actions for judicial relief on similar grounds prior to the filing date of this opinion." *Id.*

[14] Reply to Brief of *Amicus Curiae* in Opposition to Certiori, at 3-4.

[15] Petition for a Rehearing in the Supreme Court—Brief *Amicus Curiae* of the Charles Houston Bar Association and The National Conference of Black Lawyers, at 9-11. Reprinted in Appendix pp. 1a-12a.

[16] *Franks* v. *Bowman Transportation, Inc.*, 424 U.S. 747 (1976); *Mims* v. *Wilson*, 514 F.2d 106 (5th Cir. 1975); *Meadows* v. *Ford Motor Company*, 510 F.2d 939, 948 (6th Cir. 1975); *Baxter* v. *Savannah Sugar Refining Corporation*, 495 F.2d 437, 444-445 (5th Cir. 1974).

[17] *See* discussion *infra*, Part II.

This amounted to a fairly broad and ambiguous partial retrospective application which clearly imposed a substantial burden upon the University and jeopardized both admissions programs then in existence and admission decisions already made.

The University sought no relief from the additional burden in its petition for rehearing. Again, it was left to *amici curiae* to be the true adversary and to raise this very significant issue. *Amici* pointed out that the retrospective application allowed in this case was not mandated by the current state of the law or by considerations of fairness or public policy.[18]

5. The University failed to allow the case to be returned to the trial court on an issue on which it could prevail; instead the University ignored the weight of its own evidence, contradicted its earlier position and stipulated the issue away so it could obtain the final order that would invoke this Court's jurisdiction.

In its initial opinion, the California Supreme Court remanded to the trial court the issue of whether plaintiff Bakke would have been admitted to the Davis Medical School had there been no special admissions program.[19] The Court did not intimate in any way that the uncontroverted evidence submitted by the University at the trial level was insufficient. The trial court was instructed only to consider this issue in the light of tne reallocated burden of proof.

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[18] Appendix, *supra* note 15.

[19] *Bakke* v. *Regents of the University of California*, [S.F. 23311] (Sup. Ct. Ca. Sept. 16, 1976).

The University could have prevailed. Since the trial court had already imposed the burden of production on the University, the University had produced considerable evidence on this issue.[20] Plaintiff Bakke had produced none. The University argued correctly and persuasively on this issue. Its chief witness, the Associate Dean of the Davis Medical School and Chairperson of its admissions committee had stated unequivocally that Bakke would not have been admitted. (Clerk's Transcript on Appeal at 69). This testimony was not contradicted. The trial court had made explicit findings based upon the evidence in the record.

> The Court has again reviewed the evidence on this issue and finds that even if 16 positions had not been reserved . . . in each of the two years in question, plaintiff still would not have been admitted in either year. Had the evidence shown that plaintiff would have been admitted if the 16 positions had not been reserved, the Court would have ordered him admitted. (Clerk's Transcript on Appeal at 383).

Unless Plaintiff Bakke had evidence at his disposal to submit to the court, this finding would have withstood the shifted burden of proof. Nevertheless, in its Petition for Rehearing the University contended

> There is now no need to remand the case to trial court to determine whether the special admissions program resulted in the rejection of Mr. Bakke; the University stipulates that it cannot sustain

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[20] In his Addendum to Notice of Intended Decision, the trial judge stated: 'The Court agrees that the defendants, being in possession of the evidence, would have the burden of producing such evidence, but that the basic burden of proof would not shift.' Clerk's Transcript on Appeal at 383.

> the burden of proving that Bakke would not have been admitted if there had been no special admissions program . . . Mr. Bakke was a highly qualified applicant and came extremely close to admission in 1973 even with the special admissions program being in operation. (Petition for Rehearing and in the Alternative, Motion For Stay at 11)

The University went on to request that if the California Supreme Court adheres to its decision on the constitutional issue, it modify its decision and remand the case to the trial court "with instructions to order Mr. Bakke admitted . . ." [21]

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[21] This position is totally inconsistent with that taken in its brief to the California Supreme Court and its arguments at trial. In its Opening Brief, the University stated:

> For the class beginning in 1973, Bakke's file was not received and processed at the Davis Medical School in the normal course until after the March 14, 1973 mailing of acceptances, at which time 123 of the 160 acceptances, including 24 of the 32 acceptances under the special admissions program, had already been mailed. Bakke's combined numerical rating of 468 was two points lower than any applicant accepted under the regular admissions program after his evaluation was completed.
>
> At that time only four of the sixteen spaces reserved under the special admissions program remained unfilled. If we assume that the four spaces reserved under the special admissions program had been open to regular applicants, Bakke would not have been among those accepted. There were 15 interviewees with scores of 469 and 20 interviewees with scores of 468 who had not been accepted at the time Bakke's evaluation was complete and who would have been selected ahead of Bakke.
>
> Even if we assume that all 16 of the spaces reserved under the special admissions program had been open at the time Bakke's application was complete, he still would not have been among the 16 selected. There were 15

[Footnote continued on following page]

In a rather candid assertion, the University provided *raison d'etre* for this rather bizarre turnabout and for the conduct described in the foregiong litany.

> It is far more important for the University to obtain the most authoritative decision possible on the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program. A remand to the trial court for determination of that factual issue might delay and perhaps prevent review of the constitutional issue by the United States Supreme Court. (Petition for Rehearing and in the Alternative, Motion For Stay at 11-12)

It is instructive to note that the University did not say that it was seeking a favorable authoritative decision. This omission betrays an attitude which is characteristic of this area of litigation—the willingness to seek a definitive decision no matter what the outcome.

> unaccepted interviewees with scores of 469, and 20 with scores of 468. Bakke was not among the 20 interviewees with scores of 468 likely to have been selected, even assuming the selection process had gotten down that far, because he was not an applicant with a score of 468 ultimately selected for the Alternates List. (Clerk's Transcript on Appeal at 70). Opening Brief of Appellant and Cross Respondent in the Supreme Court of the State of California, at 37-38.

II.

Because A Federal Constitutional Issue Of This Magnitude Ought Be Decided Only On The Fullest Possible Record And Only Where Necessary, This Court Should Vacate The Judgment of the California Supreme Court And Remand The Case For Further Proceedings So That The State Court System Could Have An Opportunity To Perfect The Now Inadequate Record And Determine The Applicability And Construction Of Now Exisiting State Law.

This Court has frequently declined to grant certiorari because a record was not "sufficiently clear and specific to permit decision of the important constitutional questions involved . . ." *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968). The Court declines its Writ where a record is "to opaque", *Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1967) (concurring opinion of Harlan, *J.*) or because "the facts necessary for evaluation of the dispositive constitutional issues in [the] case are not adequately presented by the record", Id. at 599 (concurring opinion of Fortas and Marshall, *J.J.*) Accord, *Smith* v. *Mississippi*, 373 U.S. 238 (1963); *Newsom* v. *Smyth*, 365 U.S. 604, 605 (1961); *Naim* v. *Naim*, 350 U.S. 891 (1956).

Moreover, even after granting the Writ, the Court may review the record and find that the Writ was improperly granted. *Needleman* v. *United States*, 362 U.S. 600 (1959). And the Court may vacate and remand "in the absence of a record that squarely presents the issue and fully illuminates the factual context in which the question lies." *Morales* v. *New York*, 396 U.S. 102, 105 (1969).

While *amicus curiae* agrees that there is ample support for either course of action, the practical result of any action, excepting setting the judgment aside and remanding to the California Supreme Court for further proceeding, would be to leave standing a disputed decision of the California Supreme Court. *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 273 U.S. 126 (1927); *Gulf C. & S. Ry. Co.* v. *Dennis*, 224 U.S. 503 (1911). This result is undesirable because it would deprive the parties of an opportunity to perfect the record and to present to the Court at some time in the near future a proper case on which it might render a decision on this issue of great national importance. Such a result is not mandated by the circumstances of this case and is not in accord with the requirement that the Court dispose of cases before it "as may be just under the circumstances." 28 U.S.C. § 2106 (1948).

In the past, where the denial of review would yield results inconsistent with its mandate to do justice, the Court has acted to set aside the judgment of the state court and to remand the case for further proceedings. *Bell* v. *Maryland*, 378 U.S. 226 (1964); *Case* v. *Nebraska*, 381 U.S. 336 (1964); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1938); *Missouri ex rel. Wabash.* This is particularly true where there is some reason to believe that further proceedings can result in a better record. In such instances the Court has declared that:

> where the record . . . does not adequately show the facts underlying the decision of the state court of the federal question . . . opportunity should be given for their appropriate presentation either through amendment of the record or by further proof as the state court may be advised. *Villa* v. *Van Schaick*, 299 U.S. 152, 155-56 (1936).

A. The record is so inadequate that it is difficult to discern the nature and scope of the preferential program in question.

1. It is clear that "relative" qualification is important in this case. The California Supreme Court stated the issue as follows:

> . . . whether a special admissions program which benefits disadvantaged minority students who apply for admission to the medical school of the University . . . offends the constitutional rights of *better qualified* applicants denied admission because they are not identified with a minority. *Bakke* v. *Regents* at 38. (Emphasis added).

Likewise, Mr. Bakke has alleged that the admissions policy is stigmatizing and invidious to Task Force admittees, who, by virtue of their race, are labelled as incapable of meeting the *higher* admission standard applied to non-minority applicants. (Clerk's Transcript on Appeal at 45). (Emphasis added).

The regular admissions program relies more heavily upon the applicant's Medical College Admissions Test (MCAT) and undregraduate grade point average (GPA) as admissions criteria than does the Task Force Program. This disparate procedure precipitated the instant controversy, which the record does little to resolve The record does not include a detailed exposition of the criteria utilized by the Task Force program, nor does the record include validation studies which justify reliance on tests such as MCAT or the GPA of an applicant to judge the applicant's qualifications to enter medical school, to predict success in school or in the profession, nor does it justify the rejection of, or the declining reliance upon these traditional so-called "objective" admissions criteria for "disadvantaged" students.

2. The record is silent on the nature and content of a major feature of the admissions process—the MCAT. The sole evidence as to its value and validity is found in the deposition of Dean Lowrey.

> I think there is correlation with academic performance in the first two years of medical school; and the science part of the MCAT, I think there is not much correlation beyond that. (Clerk's Transcript on Appeal at 152)

While this cautious assertion seems to be borne out by the various validation studies completed over the years, the trial court should not have been required to depend solely on Dean Lowrey's hunches.

Not only is there no showing of correlation between test scores and either performance in medical school or success in the medical profession, no evidence was introduced to show why the two major indicators used in medical admissions were unreliable as measures to be employed in evaluating minority and disadvantaged students. Again this information was available to the University for the asking. In its brief to the California Supreme Court, the Association of American Medical Colleges cited two important studies.

> Moreover, studies have demonstrated that standardized test scores and grades do not always accurately predict an individual's academic success. (Brooks, G.C., Jr., and Sedlacek, W.E., *Predictors of Academic Success for University Students in Special Programs*, Cultural Study Center, University of Maryland Report No. 4-72, College Park, Maryland (1972)). More specifically, it has been concluded that students should be admitted to institutions of higher education by race/sex subgroups because (1) studies show no correlation

between grades and test scores and subsequent academic performance for blacks, (2) if traditional "predictors" are used, optimum validity is achieved by separate equations or "cut-off" scores for each race/sex subgroup and (3) certain background, interests, attitudes and motivations are useful in predicting the success of minority students but not of white students. (Sedlacek, W.E., *Should Higher Education Students Be Admitted Differentially by Race and Sex: The Evidence*, Cultural Study Center, University of Maryland Research Report No. 5-75, College Park, Maryland (1975)).

Mr. Associate Justice Douglas, in his dissenting opinion in *DeFunis* v. *Odegaard*, offered a most insightful and relevant assessment of the problem.

> My reaction is that the presence of a LSAT is sufficient warrant for a school to put racial minorities into a separate class in order to better probe their capacities and potentials . . . [t]he present controversy cannot in my view be resolved on this record . . . A trial would involve the disclosure of hidden prejudices, if any, against certain minorities and the manner in which substitute measurements on one's talents and character were employed in the conventional tests. *Id* at 335-336.

3. Although it is difficult to discern from the record, the Task Force seemed to make three determinations: (1) Which of the applicants who asked to be considered under the Special program for the educationally and economically disadvantaged were in fact disadvantaged sufficiently to be afforded the special consideration; (2) Which of the applicants found to be disadvantaged and

thereby eligible for special considerations were qualified to attend medical school and/or enter the medical profession; (3) Which of the qualified disadvantaged applicants would be admitted to the U.C. Davis Medical School.

It is clear that disadvantage and relative disadvantage were important considerations in this case. This becomes all the more important since those determinations yielded racially disproportionate results. Despite this, the record is devoid of the evidence which could have undercut the basis of the trial court's findings. There is no comprehensive listing of the criteria or guidelines used in defining disadvantage; there is no evidence in the record which indicates how the Task Force weighted the various factors which contributed as to an applicant's "disadvantaged" index. Most importantly, there is no attempt to compare the "disadvantaged" profiles of the minority applicants who were admitted by the Task Force through the program *vis a vis* those minority and nonminority) who were not. This comparison would have been most helpful and would probably have rebutted the Court's presumption regarding the rationale for the disproportionate racial impact.

4. The issue before the California Supreme Court in *Bakke*, was ultimately framed by the court as "whether a racial classification which is intended to assist minorities but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violated the constitutional right of the majority." 18 Cal. 3d, at 38. In resolving that issue, the court had to decide what was the appropriate standard to be applied in determining whether the program violated the Equal Protection Clause, and whether the program met the requirements of the applicable standard. The court held that the strict scrutiny standard applied.

> In the case of such a racial classification, not only must the purpose of the classification serve a 'com-

> pelling state interest', but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the gruop disadvantaged by the classification. *Id.* at 49.

Assuming *arguendo* that the California Supreme Court correctly applied the strict scrutiny standard, the state of the record is such that it could be possible that neither prong of this test could be satisfied.

While the University contends that its objectives were to integrate the student body and to improve medical care to under-serviced populations, and that these objectives amount to compelling state interests, very little evidence was adduced to underscore the urgency or accuracy of the purported objectives.

Although the University offered some statistical data to reflect the disparate representation of Blacks in the medical profession and medical schools in the United States in general, (Clerk's Transcript on Appeal at 91, fn.4) the record shows no information regarding the percentage of the minority population in the state of California, or the northern part of the state in which Davis is located, nor the percentage of minority doctors in the state. The Court, therefore, could not compare the percentage of minority applicants and admittees to the California population or the medical profession in California.

Such information would have been useful in showing the degree and impact of the underepresentation of minorities in the medical school and the medical profession and such information is readily accessible. Additionally, it would seem critical to the University's burden to show a "compelling" or legitimate governmental interest.

Having met the "compelling state interest" portion of the test, to the satisfaction of the California Supreme Court, surely the University could have attempted to demonstrate that the basic goals of the Task Force program could not have been achieved by means less detrimental to those "disadvantaged" by the program.

Amicus curiae by no means endorses any of the various alternatives suggested by the California Supreme Court, however, we concede that the record is silent with regard to the various alternatives considered by the University. Dean Lowrey stated that in his judgment,

> the special admissions program is the only method whereby the school can produce a diverse student body which will include qualified students from disadvantaged backgrounds. (Clerk's Transcript on Appeal at 67.)

That statement remained uncorroborated and unnecessarily so. At the time the record below was being developed, there existed ten University of California campuses, including four law schools, six medical schools and other graduate schools, most of which had experienced relative degrees of success in achieving objectives similar to those of the Task Force Program at Davis. The University could have produced evidence of the various alternatives attempted and the corresponding successes, if any, in achieving the objectives of the programs. The information was readily accessible. Indeed, such information was produced by the Deans of the University's four law schools in an Amicus Curiae Brief on Petition For Writ of Certiorari, at 26-31.

Perhaps the most telling criticism of the inadequacy of the record was the trial judge's explicit refusal to issue an injunction against the continuation of the program, saying:

> . . . *the Court does not believe that it has appropriate parties nor appropriate pleadings, issues and evidence before it.* (Clerk's Transcript on Appeal at 383.) (Emphasis added.)

Ironically, by its broad language and its decision to give its holding partially retrospective application, the California Supreme Court did, on this same sparse record, what the trier of fact would not.

B. As a result of a change in the Constitution of the State of California the judgment below should be vacated and this case remanded for further proceedings.

When the California Supreme Court entered its decision in this case, there was no provision of California law which directly and undeniably related to the disposition on the merits. Thus the state court felt obliged to construe and apply the United States Constitution. However, on November 2, 1976 subsequent to the California Supreme Court's decision, the Constitution of that state was amended to read in pertinent part, as follows:

> The University shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and *no person shall be debarred admission to any department of the University on account of race religion, ethnic heritage, or sex* [emphasis added]. California Const., Art. IX, § 9, Subd. F.

The amendment in question inserted the words "race," "religion," and "ethnic heritage" in the provision dealing with the admission policies of the University of California, the Petitioner in the case. As a consequence,

there is now available to Respondent the possibility of state relief for the action he brought in the state court.

The occurrence and timing of this amendment provides added and compelling support for *Amici's* contention that the Court should vacate the decision of the California Supreme Court and remand this case for further proceedings.

In *Bell* v. *Maryland*, 378 U.S. 226 (1964), this Court refused to reach the federal constitutional question presented. The Court said ". . . a significant change has taken place in the applicable law of Maryland . . . Under this Court's settled practice in such circumstances, the judgment must consequently be vacated and reversed and the case remanded so that the state court may consider the effect of the supervening change in state law. . . ." (*Id.*, at 228). This "settled practice" has developed because the Court has historically exercised its power, not only to correct errors in the judgment entered below, but also to make such disposition of the case as justice may now require. *Bell* v. *Maryland, supra; Gulf* v. *Dennis*, 224 U.S. 503 (1911). To determine what justice requires, the Court has considered changes in law and in fact which have supervened since judgment was entered in a lower court. *Bell* v. *Maryland, supra; Case* v. *Nebraska*, 381 U.S. 336 (1964); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1943); *Patterson* v. *Alabama*, 294 U.S. 600 (1934); *Dorchy* v. *Kansas*, 264 U.S. 286 (1923); *Watts, Watts & Co.* v. *Unione Austriaca di Naviganzione*, 248 U.S. 9, 21 (1918).

When new facts have supervened since judgment or where there has been a change in the law of the state from which a case comes to this Court, the Court may

consider the state questions thus arising and, at its option, may either decide such questions or remand the cause for appropriate action by the state courts. *Bell* v. *Maryland, supra; Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission; Gulf* v. *Dennis, supra.*

The change in the law of the State of California which is being brought to the attention of this Court is a change in the organic constitution of the State which has received the requisite bicameral approval and has been adopted by the voters of that state. It is thus a paradigmatic situation in which the state court should have an opportunity to interpret its own law.

III.

Because The California Court Erred In Its Interpretation And Application Of Existing Federal Law At Points Critical To Its Decision On The Ultimate Constitutional Issue Presented, This Court Ought To Exercise Its Discretion To Notice A Plain Error Not Presented, Reverse The Judgment Of The Lower Court And Remand The Case For Reconsideration In Light Of Prevailing Federal Law.

In reviewing the trial court's finding that the University's special admission program constituted discrimination in favor of racial minorities and that it was thereby violative of the Fourteenth Amendment, the California Supreme Court committed reversible error when it framed the sole issue to be determined as being

> whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violates the constitutional rights of the majority. *Bakke* v. *Regent* at 48.

Under this Court's prevailing interpretations of the Fourteenth Amendment, the question should have been whether the challenged program represents purposeful discrimination against the affected race in the first instance; and secondarily, whether such discrimination has the alleged effect of depriving the plaintiff of his constitutional rights. *Washington* v. *Davis.* The burden of proving the prima facie case of discriminatory intent or purpose is on the plaintiff. However, neither the trial court nor the state Supreme Court made any finding regarding the existence of discriminatory purpose in the special admissions program.

The absence of such a finding by the trial court is not surprising. Plaintiff did not allege or seek to prove intentional discrimination. Moreover in an early submission to the court he stated explicitly that

> The intent of the Medical School in adopting the racial quota is irrelevant. *The validity of state racial discrimination is measured by effect not motive.* (Clerk's Transcript on Appeal at 43) (Emphasis added).

Apparently the trial court agreed with this assesment of the state of the law. Since the statistics provided by the University established that no white applicant had been admitted via the Task Force Program the court considered this to be conclusive proof of the alleged constitutional violation and it so found. (Clerk's Transcript on Appeal, at 295). See also *supra*, Section I, Subdivision 3. The statistical showing of disproportionate impact clearly bothered the trial judge and provided the basis for his findings.

In evaluating the admissions statistics, the trial judge acted in accordance with a number of decisions in federal district and appellate courts. These decisions were primarily Title VII cases,[22] holding that substantially disproportionate racial impact of official acts standing alone without rehabilitating justification suffices to prove racial discrimination violative of the Equal Protection Clause. It is clear from the record that the actual process by which the Task Force Admissions committee made its decision on the applicants was functionlly equivalent to the regular admissions procedure, save for the identity of the applicants. (Clerk's Transcript on Appeal at 146-192). Furthermore, there was no evdence submitted regarding the relative weights accorded by the Task Force Admissions Committee to any additional factors deemed relevant such as race, background, economic disadvantage or other special considerations; nor is it clear that such factors were in all cases considered. The trial court imported Title VII standards of racial impact and relied exclusively thereon in deciding the constitutional issue. Whatever may have been the state of the law on March 7, 1975, the decisions by this Court since that time make clear that this finding is now impermissible.

In *Washington* v. *Davis* the Court said

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious discrimination. 426 U.S. at 242.

In *Village of Arlington Heights* v. *Metropolitan Housing Development*, — U.S. —, 97 S. Ct. 555 (1977), this standard was reiterated and clarified.

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[22] *Griggs* v. *Duke Power Company*, 401 U.S. 424; (1971). *Carter* v. *Gallagher*, 452 F.2d 315 (8 Cir. 1971); *Anderson* v *San Francisco Unified School District*, 357 F.Supp. 248. (1972) Clerk's Transcript on Appeal at 304, 306.

> *Washington* v. *Davis* made it clear that official action will not be held unconstitutional solely because it results solely in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *Id* at 563.

This of course, is not to suggest that the requisite discriminatory purpose must expressly appear in the stated purposes and objectives of the special admissions program, or that its racial impact is irrelevant to plaintiff's claim that the program violates the Equal Protection Clause. Situations occur where the disproportionate racial impact is so great or so predetermined by the inherent logic of the otherwise neutral official act that it is inexplicable on grounds other than race. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In such cases, the inference can be readily and validly drawn that the invidious purpose or intent is demonstrated by the racial impact of the challenged state action. However, as the Court said in *Arlington Heights*:

> . . . such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence. *Id* at 564.

The special admissions program which was set up for the recruitment, screening and admissions of minority and disadvantaged applicants could not be purposefully operated so as to invidiously discriminate on the basis of race (as distinct from affiramatively undertaking to correct the continuing effects of past discrimination). A discriminatory purpose may be inferred from the totality of circumstances surrounding the functioning of the program including the disproportionate impact of the pro-

gram, the historical background surrounding its formulation, the specific antecedent events relevant to its daily operation, the extent to which it departed from established procedures and contemporary statements and any other explicit and implicit demonstration of the motives of the University as regards the purpose of the program. It nevertheless remains clear that the trial court was required, in the first instance, to make the fundamental inquiry into the purpose of the program, by evaluating the surrounding circumstances to determine the appropriateness of reading discriminatory purpose into the program. As demonstrated by the record and as stated above, the trial court failed to make this inquiry in accordance with the *Washington* v. *Davis* standard.

The California Supreme Court in *Bakke* v. *Regents* was aware of the ruling in *Washington* v. *Davis*. However, it is clear that the applicability of the constitutional standard articulated in *Washington* v. *Davis* to the constitutional challenge raised by plaintiff Bakke, having neither been briefed nor argued by the parties, and standing alone without any intervening authoritative judicial elaboration, was lost on the California Supreme Court. It was not until January of the following year when the relevance of the *Washington* v. *Davis* decision to the kind of inquiry that the *Bakke* case posed was spelled out in *Arlington Heights*, that the State Supreme Court would have been likely to properly frame the question of the discriminatory purpose of the special admissions program in deciding its constitutionality. Consequently, the California Supreme Court, like the trial court before it, failed to articulate the constitutional standard that a finding of purpose to engage in impermissable racial discrimination was required for a finding that the Equal Protection Clause had been violated. Furthermore, given the trial court record, the trial judge's findings of fact and conclusions of law, the California Supreme Court

was indeed precluded from finding that, as a matter of law, the racial impact of the program demonstrated a pattern of discrimination so stark that intentional and purposeful racial discrimination on the part of the University could be inferred, *Arlington Heights*.

As Mr. Justice Brennan stated in his concurring opinion in *United Jewish Organization of Williamsburg* v. *Carey*, — U.S. —, 97 S. Ct. 996 (1977) "it is a settled principle that not every remedial use of race is forbidden" Id. at 1013. Thus, the University's use of a racial classification in its Task Force program for the medical school was not *per se* violative of the Equal Protection Clause and could not *ipso facto* give rise to a presumptive and conclusive inference that the underlying purpose or intent of the program violated the Fourteenth Amendment. In addition there are a series of cases, the most recent of which is *United Jewish Organizations*, which so hold. Although that case concerned districting and apportionment under section 5 of the Voting Rights Act, to the extent that the use of racial classification in *United Jewish Organizations* was made permissable by the existence of a constitutionally valid statutory scheme, it would appear that no different result should obtain in the instant case where the official act is clearly within the ambit of the constitutionally recognized discretionary power of school authorities to formulate and implement educational policy to prepare students for a racially heterogeneous society. *Board of Education* v. *Swann*, 402 U.S. 1, 16, (1971), (by prescribing a ratio of Black to white students reflecting the proportion of the relevant service area of the school as a whole). See also, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *United States* v. *Montgomery Board of Education*, 395 U.S. 225 (1969).

Further, there was no evidence in the record to give rise to a finding by the California Supreme Court that the Task Force program was defined or administered in a way so as to confer such arbitrary authority on the Task Force admissions committee that the competency of the white applicants could be disregarded thereby making the exclusion of white applicants inevitable.

Indeed, the record was wholly inadequate in this regard, as in others, precluding a proper consideration of this most important constitutional question of first impression.

The California Supreme Court erred at yet another critical point. Reasoning by analogy to decisions in a series of Title VII cases, that court held that the burden of proof on the issue of whether Bakke would have been admitted absent the challenged program shifted to the University. In so doing the court chose to depart from the general rule that the burden of proof remains with the plaintiff.

The question of how to allocate the burden of proof in this type of case is one of first impression. The cases cited by the lower court are not controlling because the analogy to Title VII is inapposite. Title VII cases are class actions [23] of a special genre in which the Congress and the courts have recognized the peculiar circumstances

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[23] Due to the special nature of claims brought under Title VII, these actions are usually treated as class actions under Fed. Rules of Civ. Proc., 23(b). The policy was articulated in the Advisory Committees' Note (b)(2):

> 'This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an infinitive nature... settling the legality of the behaviour with respect to the class as a whole is appropriate.'

of the claim and acted to create a presumption in favor of the plaintiff once a pattern of discrimination against the class is established.

This case does not involve a class action and has not been decided pursuant to some specific federal legislation. Rather, this is an individual claim raising a constitutional issue. As such it is subject to the distinction made explicit by this Court in *Washington* v. *Davis*,

> We have never held that the constitutional standard for adjudicating claims of racial discrimination is identical to the standard applicable to Title VII, and we decline to do so today. *Id.* at 239.

The process of admitting students to a graduate or professional program is a complex one in which many factors play a part. Many of these factors are intangible and are not susceptible to being described with the degree of accuracy and specificity as the more objective grade averages and test scores. Therefore, to require the University to prove that any rejected applicant from a pool of admittedly qualified persons would not have been admitted absent the special program, is to impose a very high burden indeed. The inevitable effect of so high a burden is to force educational institutions to narrow the range of their considerations. As *amici* said in our Petition for Rehearing in the California Court ". . . the practical effect of shifting the burden to the university is to force reliance on admittedly unreliable numerical indicators, thereby creating a chilling effect upon the exercise of sound academic discretion." *Id.* at 10-11.

Such a result can be justified only by some overriding public policy. No such policy exists.

The inability to justify the shifting of the burden on the basis of Title VII means that some independent basis in fact or policy must be discerned for the shift, or the

general rule ought to apply. No general policy imperatives emerge. Unlike the school desegregation and other racial discrimination cases, the plaintiff in this case neither alleged nor established that the University had practiced intentional invidious discrimination. Nor can he contend persuasively that a "fundamental interest" is involved. His is simply a claim of a frustrated applicant who is seeking relief from a program which he admits is benign in purpose even though he considers its operation unfair.

Since the University had the requisite data, it is appropriate that it was given the burden of production. Once this is accomplished plaintiff should be subject to the customary burden to establish each and every element of his case by a preponderance of the evidence.

IV.

Although There Are Sound Reasons In Law And Policy Why The Ultimate Constitutional Issue Purportedly Presented In This Case Ought Not To Be Decided At This Time, If The Court Chooses To Reach That Issue It Should Reverse The California Supreme Court And Declare The Constitutionality Of Affirmative Action And Minority Admissions Programs Which Consider Race And Cultural Background In Such A Manner As To Afford A Limited Preference To Qualified Minority Applicants.

The University of California is not alone in its rush to judgment on this issue. This Court was roundly criticized when it wisely decided that *DeFunis* was not justiciable because of mootness and returned the case to the Supreme Court of the State of Washington.[11] A dis-

[11] See Baldwin, F. N. *Defunis* v. *Odegaard*, The Supreme Court and preferential law school admissions: discretion is some-

[Footnote continued on following page]

tinguished member of the Court has joined this criticism and has urged the Court to quickly decide the issue. Dissenting in *DeFunis*, Mr. Justice Brennan stated

> . . . in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided concern vast numbers of people, organizations and colleges and universities, as evidenced by the filing of twenty-six *amici curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this court. Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. Although the Court should of course avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. (citations omitted) *DeFunis* at 350.

Without ascribing the position to Justice Brennan, *amicus curiae* would not want his views on the dangers of unnecessarily avoiding constitutional adjudication to encourage others to adopt the posture that any decision is better than no decision. Fortunately, this is a position which historically has been rejected by the Court. *Ashwander* v. *Valley Authority*.

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times not the better part of valor. U.Fla. L. Rev. 27:343-60, Winter '75; Ely, J.H. Constitutionality of Reverse Racial Discrimination. U. Chi. L. Rev. 41:723-741, Summer '74. For a contra position see Pollak L. "Defunis Est Non Disputandum," 75 Col. L. Rev. 495 (1975).

The question purportedly presented by *Bakke* is not only difficult and controversial, but, as Justice Brennan himself said, one which "raises particularly sensitive issues of doctrine and policy". *United Jewish Organization* at 1013-1014. This Court's response could very well be the most profound judicial pronouncement on civil rights since *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Whether or not the decision of the Court is profound, the debate will continue regardless of the outcome of the instant case. The notion that a decision on this issue from the court will be sufficiently "definitive" so as to put this entire issue to rest reflects a perception that is not in accord with reality. This court has no magic wand with which to dispel differences and still debates. History bears out *amicus curiae's* belief that the legal, political and practical problems of achieving a national consensus are not likely to be resolved by this Court's decision on the merits of this case regardless of how definitive the ruling may be. Years and even decades after the definitive decisions were rendered, the debate continues in the areas of school desegregation, *Brown* v. *Board of Education;* abortion, *Roe* v. *Wade*, 410 U.S. 113 (1973); obscenity, *Roth* v. *United States*, 354 U.S. 476 (1957); capital punishment, *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Those decisions were sought and hailed as panaceas. Yet each fueled rather than ended the debate; all proved fertile grounds for more litigation as affected parties strove to test their limits; none resolved the larger problems symbolized by the issue it addressed.

Those who would have moved the Court into the morass of the merits of *DeFunis* were wrong then and are wrong now. In the three years since *DeFunis*, this issue has matured considerably. Rather than witnessing

the disaster which many predicted would occur if special admissions programs operated with neither the imprimatur nor the proscription of the Court, these years have provided the opportunity for sustained serious scholarship and continued experimentation. This scholarship and experimentation have greatly illuminated and clarified the role of the Court in this very complex social and political issue.

It has become clear that if the Court reaches the merits, it must uphold the constitutionality of the challenged program and reverse the California courts. The supporting constitutional arguments are considered exhaustively in several of the briefs now being submitted to this Court. Therefore, *amicus curiae* will urge the Court's attention to Professor Bell's summary of the arguments he made on its behalf in *DeFunis*

> Legislative and judicial declarations of racial equality do not automatically eradicate conditions and remedy deprivations that led to their promulgation. Meaningful implementation requires adoption, usually under a specific legal mandate, of color-conscious corrective policies designed to provide those excluded by race with the opportunity to compete on an equal basis for the places from which they were excluded.
>
> But a state law school, cognizant of the historic exclusion of minority groups from the legal profession, may voluntarily adopt a modest affirmative action admissions program reasonably intended to ameliorate past exclusionary patterns without violating the rights of non-minority applicants whose chances for admission may be lessened by such programs. *De Funis, Brief of the National Conference of Black Lawyers Amicus Curiae*, pp. 7-8. Whatever the dissimiliarities which exist between law schools and medical schools

they do not touch upon the validity and applicability of that conclusion.

Candor demands an admission that the affording of preferential treatment to designated groups in a pluralistic society raises some very special concerns. The concerns have been most clearly expressed by Justice Brennan.

> *First*, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries.
>
> . . . This concern, of course, does not undercut the theoretical legitimacy or usefulness of preferential policies. At the minimum however, it does suggest the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb.
>
> *Second*, . . . even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities such a policy may imply to some the recipients' inferiority and especial need for protection.
>
> *Third*, . . . even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination. *United Jewish Organization* at 1013-1014.

As legitimate and genuine as these concerns are, even the sparse record of this case establishes that the program in question is not designed as a disguise for the continuation of invidious discrimination, is not operated to so unduly stigmtize its recipient groups and will not tend to impact on any "discreet and insular" minority.

CONCLUSION

To reach the ultimate issue presented in this case, this Court will have to take the anomalous position that plaintiffs who allege "reverse discrimination" will be more warmly received than true civil rights litigants—the intended primary beneficiaries of the Civil War Amendments. If after reaching this issue the Court should fail to reverse the California Court and uphold the constitutionality of the special admission program, this Court will be signal to the onset of a new era of deterioration in the inglorious history of race relations in the United States.

Respectfully submitted,

RALPH R. SMITH
3400 Chestnut St.
Philadelphia, Pa. 19174
(215) 243-6072

ANSLYENE A. ABRAHAM
3045 W. 7th St.
Los Angeles, Calif. 90005
(213) 380-4790

VANCE FORT
634 North Carolina Ave., S.E.
Washington, D.C. 20003

Of Counsel:
LENNOX S. HINDS
National Director

VICTOR M. GOODE
Associate Director

National Conference of Black Lawyers
126 West 119th Street
New York, New York 10027

APPENDIX

APPENDIX A

In The

SUPREME COURT OF THE
STATE OF CALIFORNIA

ALLAN BAKKE,
Plaintiff, Cross-Appellant, and Respondent,

—VS.—

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant, Cross-Respondent, and Appellant.

Petition for a Rehearing in the Supreme Court
Brief Amici Curiae of

The Charles Houston Bar Association and the National Conference of Black Lawyers in Support of the Position of The Regents of the University of California

To the HONORABLE DONALD R. WRIGHT, Chief Justice, and to the HONORABLE ASSOCIATE JUSTICES of the SUPREME COURT of the STATE OF CALIFORNIA:

Permission to File

Pursuant to Rule of Court 14(b), permission to file a BRIEF AMICI CURIAE in support of the Petition for Rehearing was requested and granted on September 29, 1976.

APPENDIX A—Petition for a Rehearing in the Supreme Court, Brief Amici Curiae of The Charles Houston Bar Association and The National Conference of Black Lawyers in Support of the Position of The Regents of the University of California

I. Introduction:

Interest of Amici Curiae

The Charles Houston Bar Association is an association principally comprised of black attorneys in northern California. It is an affiliate of the National Bar Association, a nationwide organization of Black attorneys and law students. Charles Houston Bar Association has been actively involved in promoting and protecting the civil rights of all minorities. The Association has made continuing and persistent efforts to remedy the effects of past discrimination in a number of areas which include employment, housing, access to professions, and continuing education of minority members of the bar in areas of specialized interest. The Association includes among its membership judges, attorneys and law professors. It also has a close working relationship with minority law student organizations. The Charles Houston Bar Association therefore, has a direct interest in the outcome of this matter, which interest is derived from its involvement in the resolution of legal problems of minority citizens.

The National Conference of Black Lawyers (N.C.B.L.) is an incorporated association of black lawyers and law students in the United States and Canada. N.C.B.L. was established in December of 1968 for the purpose of providing an organized unit to serve as an effective advocate of the rights of minorities and the poor. In furtherance of its stated purpose N.C.B.L. has: conducted a systematic program of federal and state litigtion designed to

provide dequte protection of the rights of the politicly unpopular criminal defendant; initiated civil actions to compel equal distribution of community services; monitored the work of state and federal legislatures, administrative agencies, courts and the executive to insure that the interests of the poor and racial minorities are properly represented. In the area of legal education, N.C.B.L. has pressed to eradicate exclusionary practices in law school admission, grading and bar examination evaluation.

Minority group lawyers have a unique role to play in assisting professional schools in the development of sound programs designed to identify and train minority lawyers and doctors for the purpose of correcting the present imbalance in the distribution of legal and medical services.

One of the most important challenges facing this country consists of devising legally sound and effective methods for equalizing access to professional education (both medical and legal), and thereafter equalizing access to quality medical and legal services. Medical schools and law schools throughout the country have addressed this challenge honestly and openly by drafting a variety of programs with the express purpose of increasing the racial and ethnic diversity of their respective student bodies. While the structure and implementation of these programs varies greatly from school to school and between law schools and medical schools, the sweeping language contained in the majority opinion, passing upon the constitutionality of "special" admissions programs, will surely impact all professional school programs of this type.

Historically, educational institutions have been given broad discretionary powers to formulate and implement policy for their governance. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *San Francisco Unified School Board* v. *Johnson*, 3 Cal. 3d 937 (1971). The debate among educators which preceded,

and has continued unabated since the Supreme Court decision *De Funis* v. *Odegaard*, 416 U.S. 312 (1974), is evidence of the deeply held differences among reasonable persons charged with the specialized duty of selecting among large numbers of admittedly qualified applicants for admission to professional schools. It is precisely because of this profound debate among educators that the admissions process is poorly suited to judicial supervision.

Charles Houston Bar Association and the National Conference of Black Lawyers supports wholeheartedly the efforts which have been made to date by law schools and medical schools to provide opportunities for obtaining a legal or medical education to qualified applicants of diverse racial, cultural and economic backgrounds. The amici therefore have a direct interest in preserving this diversity and the resulting benefits which accrue to urban and rural communities of the poor and racial minorities.

The decision in this case will have broad impact within the State of California and nationwide. In recognition of this fact, *amici* offer the arguments which follow for the purpose of seeking further clarification of the rule announced in this case. *Amici* support whoeheartedly the dissenting opinion filed by Justice Tobriner. It adequately presents the arguments which oppose those articulated by the majority. This brief, therefore, will confine itself to discussion of those points which are not expressly questioned by the dissent and for which amici feel there is a ned for additional argument.

II. The rule of partial retrospective application announced in this case is required by neither considerations of fairness nor public policy.

The problem of the manner in which a new court-made rule is to be applied is troulesome in any case, ut particularly so where constitutional considerations predomi-

nate (*see*, Note, *Prospective Overruling and Retroactive Appliction in the Federal Courts*, 71 Yale L.J. 907 (1962)). The rule of prospective application was announced by this court in *Westbrook* v. *Mihaly*, 2 Cal. 3d 765 (1970). In that case the court stated:

> "It is now beyond dispute that the United States Constitution permits State Appellate Courts to restrict the application of a newly announced rule of law to future cases." *id* at 800.

In the circumstances of *Westbrook* the court considered it fairer and wiser that only prospective effect be given to the decision. The parties then before the court were decriteria stated for prospective application were fairness and public policy. Justice Mosk, however, concurred on the merits but dissented from the majority's refusal to apply its decision to the litigants before the court. He reasoned that such a rule would destroy incentive for appeal (citing Miskin, *Foreward, The Supreme Court 1964 Term*, 79 Harv. L. Rev. 56, 61 (1965)). Justice Mosk further stated that three alternatives, which bear restating in the instant case, were available to a state court which fashioned a new rule: "The rule may be applied, (1) to acts occurring subsequent to the announcement only; (2) to acts occurring subsequent to the announcement and also to the present litigants; or (3) to acts occurring subsequent to the announcement, to the present litigants, and also to acts which occurred prior to the announcement." *Westbrook*, *supra* at 803. Justice Mosk rejected the first alternative and indicated a preference for the second. This view was subsequently reiterated in *Nga Li* v. *Yellow Cab*, 13 Cal. 3d 804 (1975), in which Justice Mosk again concurred on the merits but dissented from the ruling on retroactivity. He indicated that notwithstanding the majority's statement to the contrary, *Westbrook* should be deemed overruled on the question of prospective application. (*See also*, *Childers*

v. *Childers*, 74 Cal. App. 2d 56 (1946), *In re Stewart*, 10 Cal. 3d 902 (1974), *In re Yurko*, 10 Cal. 3d 857 (1974)).

It is in the light of the above discussion that amici urge the court to adopt Justice Mosk's second alternative in this case. The rule announced here is certainly a new rule, without precedent in either state or federal decisions. (*See Alevy* v. *Downstate Medical Center*, N. Y. Ct. of Appeals, Civ. No. 63, April 8, 1976.) The application of this rule, therefore, to acts which occurred prior to September 16, the date of filing of the decision in this case, and which were fortuitously reduced to filed complaints for judicial relief before that date, is not required by public policy nor considerations of fairness. Rather, it appears that there are opposing considerations which support limiting application to plaintiff Bakke, alone, and thereafter prospectively. These considerations are derived from the fact that this rule will be applied to public institutions which relied upon the absence of a decision on the merits in the *De Funis* case, *supra*, to continue to structure programs designed to achieve, what even the majority is willing to admit arguendo is, a compelling state interest: integrating access to professional school education. Educators who exercised sound academic discretion, in an area where the status of the law could at best be characterized as murky, should not be penalized by retrospective application. Those plaintiffs who filed before September 16 have no such reliance interest, but they will be the recipients of a windfall consisting of a newly allocated burden of proof and a finding of discrmination against the University. Amici therefore urge the court to limit application of the rule announced in this decision to plaintiff Bakke, and thereafter prospectively.

The scope of retroactivity is further enlarged by the use of the word applicant in footnote 34 of majority opinion:

There is a further question which arises concerning retroactivity. It is the scope of the class of plaintiffs who are covered by this rule. The retroactive application becomes more onerous if the word "applicant" contained in footnote 34 of the majority opinion is deemed to include not only other applicants to Davis Medical School, but applicants to law schools, veterinary schools, graduate schools of business, non-professional degree programs or even undergraduate schools. If all such persons are included in the definition of applicant, then retroactive application further enlarges the scope of the potential liability of public institutions. This issue is no small matter, particularly when such liability may, in some circumstances, extend to include damages. *Wood* v. *Strickland*, 420 U.S. 308 (1975).

It is also unclear what the majority means when it is stated that actions which have been filed "on *similar grounds* prior to the filing date of this opinion." Does similar grounds include the state equal protection clause? Will actions against *private* institutions be covered by this decision? These areas of uncertainty will be difficult in prospective consideration; however, they combine to produce an intolerable result, where as here, the rule receives retrospective application.

All of the above stated reasons present questions which merit rehearing in the instant case.

III. The reallocation of the burden of proof to the university once plaintiffi has made a prima facie showing that he was the object of university discrimination is unwarranted and will unnecessarily burden the admittedly difficult exercise of sound academic discretion.

The University, upon retrial, will be required to assume the burden of going forward with evidence that claimant would not have been admitted without the preference. The instant case is dissimilar to *Haft* v. *Lone Palm Hotel*, 3 Cal. 3d 756 (1970), where a wrongful death action was brought against the owner of a pool who violated a city ordinance which required lifesaving equipment to be kept poolside. This violation resulted in the drowning of plaintiff's decedent. The burden of was there shifted to defendant to require proof that absence of the lifesaving equipment was not the cause in fact of the drowing. The dissimilarity of the instant case to proof of cause in fact which is susceptible of probability proof is clear. The admissions process is greatly infused with many imponderable variables. Therefore, to require the University to prove that any rejected applicant, from a pool of often admittedly qualified persons, would not have been admitted absent the preference for minorities, is to require a virtual impossibility. There is no rule of public policy which requires that the customary burden of proving each and every element of his case be removed from the plaintiff in these actions.

It is also dissimilar to *Franks* v. *Bowman Transportation, Inc.*, 44 U.S.L. Week 4356 (1976). While *Franks* v. *Bowman* is cited by the court for the proposition that the burden be shifted to the defendant once discrimination is demonstrated, the principal import of that case is that affirmative remedial action to cure the effects of past

employment discrimination within the group which was the object of prior invidious discrimination is permissble. *Franks* does not requre the shifting of the burden of proof in this case, because this case does not involve invidious racial discrimination. It is clear that the case must be read in its entirety. While this distinction is rejected by the majorty for purposes of deciding the merits of question of affirmative use of race to confer a benefit to members of racial minorities; this important procedural difference should not be imported wholesale without an explicit weighing of the benefits and detriments which will accrue to each party.

Amici therefore urge that the customary burden imposed upon the plaintiff to establish each and every element of his case by a preponderance of the evidence be retained in this case. Further, that a limited recognition of the desirable object sought by defendant University be reflected in a rejection of the shifting of the burden of proof to defendant in these cases.

Although the majority indicates that the University is not required by this decision to adhere to a strictly numerical standard (*Bakke* v. *Regents of University of California*, Multilith Opinion, p. 30, S.F. No. 23,311, filed September 16, 1976); the practical effect of shifting the burden to the University is to force reliance on admittedly unreliable numerical indicators, thereby creating a chilling effect upon the exercise of sound academic discretion. This conclusion is largely supported by the amicus briefs filed by the American Association of Law Schools and the American Association of Medical Colleges filed in this action.

IV. To the extent that race and disadvantage are Overlapping or congruent classifications the prohibition against "reverse discrimination" imposes a heavy burden on professional school administrators.

The word "disadvantage" appears freely throughout the opinion but is nowhere defined. It become apparent, after only momentary reflection, that membership in a minority race is the principal immutable "disadvantage" which motivated passage of the Fourteenth Amendment. *Slaughterhouse Cases*, 83 U.S. 36 (1873). The majority suggest that the University may reasonably conclude that the lower academic scores of "disadvantaged" students are not reflective of their actual academic potential, and might therefore be weighed accordingly. In addition it is suggested that personal interviews, recommendations, character, the applicants professional goals are all permissible considerations, as long as they are not utilized in a racially discriminatory manner. These were all factors which the University did utilize in making admissions decisions in this case. The dilemma of the University, and educators similarly situated, emerges when the following possibilities are taken into account. If a personal interview is granted to any applicant how can the administrator or faculty member making an evaluation purge himself of the allegation that race was a factor in either the decision to admit or deny admission? In the case of the Davis Medical School where this court has affirmed the trial court finding of discrimination, the University will be placed under the ouble burden of defending each case on its merits, and purging itself of the presumptions which a finding of past discrimination raises.

The question remains: to what extent will future decisions made upon disadvantage, but not race, be rendered suspect because of the finding of discrimination in this case.

V. Conclusion

Amici have raised questions which merit careful reconsideration in a rehearing with full argument by all parties. The questions raised are of sufficient importance considering the broad impact which this decision will have if allowed to become final without the requested modifications.

EMMA COLEMAN JONES
Attorney for Amici Curiae,
Charles Houston Bar Association,
National Conference of Black Lawyers.

Of Counsel:
ROBERT L. HARRIS,
LENNOX HINDS

The following organizations have adopted and endorsed the arguments set forth herein:

The New Jersey Association of
Black Women Lawyers

Lois Wright
29 S. Munn Avenue
East Orange, New Jersey 07018

The Charles Houston Bar Association

Emma Coleman Jones
King Hall
Davis, California 95616

The Black Women Lawyers of California
(Los Angeles)

Anslyene A. Abraham
3045 W. 7th Street
Los Angeles, California 90005